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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PENNSYLVANIA PROTECTION AND
ADVOCACY, INC.,

Plaintiff,

Civil Action No. 1:00-CV-1582

v.

Judge Caldwell

DEPARTMENT OF PUBLIC WELFARE
OF THE COMMONWEALTH OF
PENNSYLVANIA; *et al.*,

Defendants.

FILED
HARRISBURG, PA

JUN 13 2002

MARY E. S. ANDREA, CLERK
Per _____
Deputy Clerk

**PLAINTIFF'S MOTION FOR LEAVE TO FILE
SUR-REPLY BRIEF IN SUPPORT OF ITS MOTION FOR
PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiff Pennsylvania Protection and Advocacy, Inc., through its counsel, submits this Motion for Leave to File a Sur-Reply Brief in support of its Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment. The proposed Sur-Reply Brief is submitted with this Motion. In support of this Motion, Plaintiff states as follows:

1. Plaintiff filed its Motion for Partial Summary Judgment on January 11, 2002 on its claims under the Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA").

2. After receiving several extensions of time, Defendants filed their Brief and Exhibits in support of their Motion for Summary Judgment on all claims and in opposition to Plaintiff's Partial Summary Judgment Motion on April 15, 2002.

3. Plaintiff timely filed a Brief in opposition to Defendants' Summary Judgment Motion and in support of its Motion for Partial Summary Judgment on May 2, 2002.

4. After receiving two unopposed extensions of time, Defendants filed their Reply Brief in support of their Summary Judgment Motion on May 31, 2002.

5. In their Reply Brief, Defendants address matters that had not been raised in their prior Brief and to which Plaintiff seeks to file a short Sur-Reply, which is submitted with this Motion. Specifically:

a. In its Brief in support of its Motion for Summary Judgment, Plaintiff relied extensively on the June 21, 2000 Patient Profile prepared by SMRC professional staff that showed 80% of the SMRC residents to be able to live in community programs. In their Reply Brief, Defendants for the first time cite deposition testimony that they claim indicates that SMRC professional staff fabricated the responses in the Patient Profile. Defs.' Reply Br. at 13. In its proposed Sur-

Reply Brief, Plaintiff demonstrates that the deposition testimony does not support Defendants' assertion.

b. In its Reply Brief, Defendants re-assert that they have a comprehensive, effectively working "plan" that is sufficient to satisfy their obligations under the ADA's and RA's integration mandate, Defs.' Reply Br. at 2-6, citing (and submitting), *inter alia*, a new document -- the Community/Hospital Integration Plan dated February 27, 2002. Defs.' Reply Br. at 3 n.2. Plaintiff's proposed Sur-Reply Brief addresses this issue, including the role of the February 2002 "plan."

c. In its Reply Brief, Defendants re-assert their fundamental alteration argument. In doing so, they raise a number of new issues, including: (1) that the Commonwealth cannot shift funds; and (2) that mental health funding has increased. Defs.' Reply Br. at 30-34. Plaintiff's proposed Sur-Reply Brief addresses these assertions.

6. Defendants did not concur in Plaintiff's Motion. *See* Certification of Non-Concurrence.

7. Given the importance of the issues and the limited scope and length of the proposed Sur-Reply Brief, Plaintiff respectfully requests that the Court consider the Sur-Reply Brief in ruling on the pending Motions.

Respectfully submitted,

Dated: June 11, 2002

By:


Robert W. Meek
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and

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Disabilities Law Project
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(412) 391-5225

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Robert W. Meek, hereby certify that true and correct copies of Plaintiff's Motion for Leave to File Sur-Reply Brief in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Motion for Partial Summary Judgment were served on the following by first class mail, postage prepaid on June 11, 2002:

Michael L. Harvey, Esquire
Senior Deputy Attorney General
Office of Attorney General
Strawberry Square
Fifteenth Floor
Harrisburg, PA 17120

Howard Ulan, Esquire
Senior Assistant Counsel
Department of Public Welfare
Office of Legal Counsel
Health & Welfare Building
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Thomas J. Blazusiak, Esquire
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Department of Public Welfare
Office of Legal Counsel
Allentown State Hospital
Room 130 Medical Services Building
1600 Hanover Avenue
Allentown, PA 18103



Robert W. Meek

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PENNSYLVANIA PROTECTION AND
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FJ
HARRIS

DEPARTMENT OF PUBLIC WELFARE
OF THE COMMONWEALTH OF
PENNSYLVANIA; *et al.*,

Defendants.

JUN 13 2002

MARY E. D'ANNA
Per *LB*
Deputy

CERTIFICATION OF NON-CONCURRENCE

Pursuant to Local Rule 7.1, I, Robert W. Meek, declare that I contacted Senior Deputy Attorney General Michael L. Harvey, co-counsel for Defendants, to request his concurrence in Plaintiff's Motion for Leave to File Sur-Reply Brief in support of its Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment. Mr. Harvey informed me that Defendants did not concur in that Motion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of June, 2002.



Robert W. Meek

CERTIFICATE OF SERVICE

I, Robert W. Meek, hereby certify that true and correct copies of the Certification of Non-Concurrence concerning Plaintiff's Motion for Leave to File Sur-Reply Brief in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Motion for Partial Summary Judgment were served on the following by first class mail, postage prepaid on June 11, 2002:

Michael L. Harvey, Esquire
Senior Deputy Attorney General
Office of Attorney General
Strawberry Square
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Harrisburg, PA 17120

Howard Ulan, Esquire
Senior Assistant Counsel
Department of Public Welfare
Office of Legal Counsel
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